IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1344

RICHARD A. SCARBOROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

PHILIP J. HIRSCHKOP
LEONARD S. RUBENSTEIN
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-5555
Attorneys for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not published and attached as an appendix to the Petition for a Writ of Certiorari.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1976.

On October 4, 1976, this Court granted the Petition for a Writ of Certiorari limited to Question No. 1 presented by the Petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 18 U.S.C. App. §1202(a) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony' . . .

* * *

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined no more than $10,000 or imprisoned for not more than two years, or both.

QUESTION PRESENTED

Whether the Court erred in holding that a conviction under 18 U.S.C. App. §1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely upon a showing that the possessed firearm has previously at any time, however remote, traveled in interstate commerce.

STATEMENT OF THE CASE

On September 8, 1972, Mr. Scarborough was convicted in the Circuit Court of Fairfax County, Virginia, on felony charges of possession with intent to distribute a controlled drug [A. 2]. Subsequently, on August 1, 1973, petitioner was arrested, by a county policeman, who then obtained a search warrant for any controlled

substance that might be found in Scarborough's home. Thereafter, several policemen made a search and seized four weapons within the Scarborough residence, where the petitioner lived with his wife.

Scarborough was subsequently charged in a one count indictment alleging receipt and possession of the four firearms in violation of 18 U.S.C.App. §1202(a) [A. 1]. During pretrial discovery in the District Court, the Government acknowledged in a Bill of Particulars that the possession of the four weapons affected commerce by having previously traveled in commerce anywhere from over three years to eighty years prior to petitioner's state felony conviction [A. 5].

On October 23, 1973, a jury trial was held before the Honorable Albert V. Bryan, Jr., District Court Judge for the Eastern District of Virginia, Alexandria Division. At trial, numerous witnesses were called by the Government in an attempt to establish that the seized weapons had traveled in and affected interstate commerce [A. 6-9]. However, with regard to all four weapons, the proof uniformly established movement in interstate commerce *prior* to September 8, 1972, the date upon which the petitioner became a convicted felon. The Universal Enforcer was shown to have been shipped on May 21, 1969 [A. 8]; the Colt Cobra was shown to have been shipped in mid 1969 [A. 6]; the M-1 rifle was shown to have been shipped in 1966 [A. 9]; and the fourth weapon was shown only to have been manufactured in France at an uncertain time in the late 1800's [A. 10]. The evidence further bore out that petitioner had come into possession of these firearms well before the date of his state conviction [A. 10-11].

Because no evidence was introduced showing that these guns had moved in or affected commerce at any time after his state conviction, counsel for petitioner

moved for a judgment of acquittal at the close of the Government's case. The Court then dismissed that part of the indictment alleging "receipt," as there was not any evidence of receipt of any weapon after the felony conviction [A. 12]. The case concerning possession, however, continued. The Court later denied a proffered instruction concerning the required nexus between possession and commerce, which stated in pertinent part:

> In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the 'possession' of the firearms and interstate commerce. For example, a person 'possesses' in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the 'possession' affected commerce. It is not enough that the Government merely show that the firearms at some time had traveled in interstate commerce. . . . [A. 12-13]

This instruction was based on this Court's opinion in *United States v. Bass,* 404 U.S. 336, 350 (1971).

Instead, the Court instructed the jury that:

> . . . The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce. . . . [A-13]
>
> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun. . . . [W]hile the government must prove the connection

> with interstate commerce beyond a reasonable doubt, under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score. . . . [A. 14].

Thereafter, on October 24, 1973 Scarborough, having previously been convicted of a felony, was found guilty of possession of four firearms in commerce or affecting commerce. On November 30, 1973, petitioner was sentenced to confinement for a period of one year, said sentence to run consecutively with any current sentence. Petitioner is presently free on bond for this conviction.

On January 29, 1976, the United States Court of Appeals for the Fourth Circuit affirmed Scarborough's conviction, holding that mere possession of firearms that have previously traveled in interstate commerce provides a sufficient nexus between that possession and commerce so as to support a conviction under 18 U.S.C. App. §1202(a), regardless of whether the firearms came to rest in the possession of an individual before having been convicted of a felony.

ARGUMENT

A CONVICTION UNDER 18 U.S.C. App. §1202(a) FOR POSSESSION OF A FIREARM IN COMMERCE OR AFFECTING COMMERCE BY A CONVICTED FELON CANNOT BE SUSTAINED MERELY UPON A SHOWING THAT THE POSSESSED FIREARM HAS PREVIOUSLY TRAVELED IN INTERSTATE COMMERCE AT ANY TIME, HOWEVER REMOTE.

In *United States v. Bass*, 404 U.S. 336 (1971), the Court held that under 18 U.S.C. App. §1202(a), a nexus to interstate commerce must be shown with respect to a convicted felon receiving, transporting, or possessing a firearm. 404 U.S. at 347. The Court affirmed the Second Circuit's decision reversing Bass' conviction, since the Government failed to allege or prove any nexus with interstate commerce. 404 U.S. at 347. The question presented in this case concerns the degree of nexus to commerce required to sustain a conviction for possession of a firearm by a convicted felon. That question has already been answered by a plurality of this Court.

In Part III of the *Bass* opinion, Justice Marshall, joined by Justices Douglas, Stewart, and White, discussed the necessary commerce nexus that must be proven with respect to the "possession" and "receipt" offenses and stated that a greater nexus must be shown for a possession conviction than for a receipt conviction:

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of 'receiv[ing] . . . in commerce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.

404 U.S. at 350 (footnote omitted).

Concerned with the delicate balance between state and federal law enforcement, the Court in *Bass* declared, "We do not interpret §1202(a) to reach the 'mere possession of firearms.'" 404 U.S. at 350. The position of the Government that a conviction for possession of a firearm may be sustained merely upon a showing that the firearm had at some time, however remote, traveled in commerce, even though the gun had long since come to rest, clearly seeks to make "mere possession" illegal.

The distinction between receipt and possession is well founded. Although there is a conflict among the Circuits concerning whether proof of a firearm's prior travel in interstate commerce is sufficient to convict for either receiving or possessing, the more reasonable view is that the crime of possession must hinge upon more than proof that the gun had previously traveled in interstate commerce prior to the individual's felony conviction. Principles of statutory construction, coupled with important considerations inhering in principles of federalism, judicial restraint and judicial economy, support the proposition that conviction for possession must be predicated upon proof of a contemporaneous effect upon commerce.

A. The Language Of §1202(a) Is Directed Only At Possession Offenses Occurring Contemporaneously With Commerce.

In *United States v. Bass*, 404 U.S. 336 (1971), the Court found the language of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L.

90-351, 82 Stat. 197, 18 U.S.C. App. §1202(a), to be too ambiguous to be read so broadly as to dispense with the requirement of a nexus with interstate commerce as an element of each offense listed in §1202(a). If the reach of the statute as a whole is opaque, however, the language concerning the proper commerce nexus required to state an offense is not. Adherence to the most elementary principle of statutory construction that the plain meaning of words must be respected necessarily leads to the conclusion that the crime of possession is only cognizable if there is a contemporaneous nexus with commerce.

Section 1202 of Title VII in pertinent part provides:

> (a) any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Since the commerce language in this statute, "receives, possesses, or transports in commerce or affecting commerce" is in the present tense, it can fairly be read to reach only a contemporaneous use of or effect on commerce. The commerce language contrasts sharply with the tense Congress used regarding the prior felony conviction requirement of §1202(a), "has been convicted. . . ." As this Court explained last Term in *Barrett v. United States,* 423 U.S. 212 (1976), the Court must recognize Congress' use of different tenses within the same statute in the construction of that statute and follow their varying effects.

In *Barrett,* unlike here, the interstate commerce reference in the statute, 18 U.S.C. §922(h), was in the present perfect tense,[1] thereby "denoting an act that is completed." 423 U.S. at 216. The Court explained further, "had Congress intended to confine §922(h) to direct interstate receipt, it would have so provided, just as it did in other sections of the Gun Control Act." 423 U.S. at 217. Congress did precisely that in §1202(a). There it used the present tense, thereby conveying that only a contemporaneous connection to commerce would sustain a conviction. And just as in *Barrett,* this Court must adhere to the language Congress chose, for "Congress knew the significance and meaning of the language it employed." 423 U.S. at 217.

Thus, unlike §922(h), §1202(a) encompasses only crimes with a present connection to commerce. That difference cannot be ignored, since "no conclusion can be drawn from Title IV [§922(h)] concerning the correct interpretation of Title VII [§1202]." *United States v. Bass,* 404 U.S. 336, 344 (1971). The fact that two statutes serve related purposes does not permit the Court to ignore clear differences in language and scope between them. *Erlenbaugh v. United States,* 409 U.S. 239, 244-47 (1972). Indeed, it is fitting that the commerce language of §1202(a) is more confining than that in §922(h),

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[1]Section 922(h) provides, in pertinent part:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

since §1202(a) includes a broader range of offenses than §922(h), including simple possession. As will be made clear below, principles of federalism dictate that firearm possession offenses are more properly subjects of state enforcement, so that the narrower federal role contemplated by §1202(a) for prosecuting such offenses than is available for receipt offenses under §922(h) is perfectly comprehensible. Accordingly, the differences in language between §922(h) and §1202(a) make sense, and must be respected.

In this case, those principles of construction inevitably require the reversal of Scarborough's conviction, since Scarborough's possession had no contemporaneous nexus with commerce. As is clear from the record, subsequent to his felony conviction, the firearms which are the subject of this prosecution merely rested in Scarborough's house.[2] Accordingly, statutory language itself

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[2]Although there was some evidence that Scarborough ordered parts for one of the weapons after his felony conviction, the jury was instructed that it could find Scarborough guilty if it simply found that "the firearm possessed by a convicted felon had previously traveled in interstate commerce." A. 14. Indeed, the trial court virtually directed the jury to return a verdict of guilty based only on the prior interstate travel of the gun: ". . . under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score." [A. 14].

Thus, the Court need not reach the question whether ordering parts for a firearm already in possession estabiishes the requisite commerce nexus. So long as the jury was told that it could—and should—convict Scarborough simply on the basis of the gun's travel prior to his felony conviction, his conviction here must be reversed. *Clay v. United States*, 403 U.S. 698, 704 (1971); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Sicurella v. United States*, 348 U.S. 385 (1955); *United Bhd. of Carpenters and Joiners v. United States*, 330 U.S. 395, 408-09 (1947); *Stromberg v. California*, 283 U.S. 359 (1931).

suffices to find a requirement of a contemporaneous nexus with commerce in §1202(a).

A contrary result is not suggested by analysis of the legislative history of §1202(a). The Court in *Bass* concluded that the legislative history failed to provide a clear purpose which could guide the courts in interpreting the statute. 404 U.S. at 346. *See, Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). There is some indication in the Senate debates, however, that the intent of Congress in enacting both this Section and §922(h) was to prevent a convicted felon's "acquisition" of a firearm subsequent to a felony conviction. *See Barrett v. United States*, 423 U.S. 212 (1976). As the Eighth Circuit noted in *United States v. Kelly*, 519 F.2d 251, 253 n.3 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975), Senator Long, the statute's sponsor, consistently used the word "acquire," as if synonomous with the word "receive."[3]

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[3]Excerpts from Senator Long's statements on the floor of the Senate amply illustrate this point:

> A lot of people have objected to the Dodd gun bill on the theory it would make it difficult for honorable people—who have a right to have weapons for the defense of their homes to acquire weapons—and would make it somewhat cumbersome and burdensome for people to cross state boundaries seeking an opportunity to hunt or engage in other sports activities, as they have historically done in this country.
>
> 114 *Cong. Rec.* 13,868 (1968).

> It would be a bother to them, and it would not really prevent what it seeks to prevent in that it would not have, for example, prevented Oswald from acquiring the weapon with which he killed John Kennedy. And it would not have kept the assassin of Martin Luther King from acquiring the weapon he used for that dastardly act.
>
> *Id.*

[Footnote continued]

Senator Long's language in the debate focusing on the prevention of the acquisition of weapons by convicted felons is appropriate. The conviction justifies restricting a person's access to weapons, as the person has already inflicted injury to society. It is quite a different matter, however, to punish a person who has acquired a gun prior to a felony conviction and who does nothing with it after the conviction except to store it in his house. Certainly if the individual does bring the weapon into commerce in the manner suggested in Part III of *Bass,* the federal police power should be invoked; but if he does not, there is no justification for punishing him.

The rules of statutory construction also compel a greater commerce nexus to convict for possession than for receipt. It is well settled that if a criminal statute is capable of inconsistent interpretations, the ambiguity should be resolved in favor of lenity. *See e.g., United States v. Bass,* 404 U.S. 336, 347 (1971); *Rewis v. United States,* 401 U.S. 808 (1971); *Bell v. United States,* 349 U.S. 81 (1955). Penal statutes must be strictly construed to provide fair notice as to what conduct is specifically proscribed. *See United States v. Bass,* 404 U.S. 336,

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The killer of Medgar Evers, the murderer of the three civil rights workers in Mississippi, the defendants who shot Capt. Lemuel Penn (on a highway while he was driving back to Washington after completion of reserve Military duty) would all be free under present federal law to acquire another gun and repeat those same sorts of crime in the future.

114 *Cong. Rec.* 14,773 (1968).

The assassin of George Lincoln Rockwell and the murderer of Malcolm X could lawfully acquire a gun upon their release from prison and kill again.

Id.

348 (1971); *McBoyle v. United States,* 283 U.S. 25, 27 (1931) (Holmes, J.). In the absence of a legislative directive, it is not the province of the Court to imply one. As Chief Justice Marshall wrote in *United States v. Wiltberger,* 18 U.S. (5 Wheat) 76 (1820):

> The rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.
>
> 18 U.S. (5 Wheat) at 95.

And, as the Court explained in *Bass,* "where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant." 404 U.S. at 348. Therefore, the statute should be interpreted to require a contemporaneous nexus to commerce to convict for possession of a firearm by a felon.

Finally, statutes should be construed to preserve their integrity. *Weinberger v. Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609, 633 (1973); *United States v. Campos-Serrano,* 404 U.S. 293 (1971). Section 1202(a) proscribes three separate offenses: receiving, possessing, or transporting firearms in commerce by a convicted felon. If the commerce nexus is held by the Court to occur when the gun came into possession of the convicted felon, then the crime is not possession at all, but *receipt,* and the Court's interpretation would merge the two crimes. This approach was taken by the Sixth Circuit, *Carter v. United States,* No. 75-2215 (6th Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3165 (U.S. Je. 28, 1976) (No. 75-1882); *United States v. Jones,* 533 F.2d 1387 (6th Cir. 1976); *United States v. Bush,* 500

F.2d 19 (6th Cir. 1974); *United States v. Brown*, 472 F.2d 1181 (6th Cir. 1973), but is plainly incorrect: the crimes are listed as separate and distinct in §1202(a), and there is no justification available to treat them as one.

The observation of the Sixth Circuit in *United States v. Brown, supra,* that "one cannot very well possess a firearm without receiving it," 472 F.2d at 1182, merely states a truism that avoids the difference between receipt and possession. To sustain a conviction for receipt under §1202(a), for example, proof of possession is not enough:

> Under a receiving charge, the government assumes the additional burden of proving that receipt of the firearm occurred in the district where the prosecution takes place.... Venue is a fact which must always be established at trial. There are also several instances when a felon can possess a weapon without the possibility of being subject to a charge of receiving it. A felon could, for example, have received a gun before he was convicted of a felony or he could have received it beyond the statute of limitations for a receiving offense and yet still be in possession.
>
> *United States v. Kelly,* 519 F.2d 251, 258 (8th Cir.), *cert. denied,* 423 U.S. 926 (1975) (footnote and citations omitted).

The blurring of the distinction between receipt and possession by the Sixth Circuit, as one court explained, "obliterates the carefully drawn distinction between the separate offenses made by the Supreme Court in *Bass* and eviscerates the language of the statute which provides for three discrete crimes." *United States v. Bell,* 524 F.2d 202, 208 n.7 (2nd Cir. 1975). Even more disturbing, the effect of this approach is to punish Scarborough for receipt of firearms prior to the time such receipt was

unlawful, since at the time he received the gun, he had not been convicted of a felony.

Moreover, adoption of the Government's reading would create additional problems as applied to a person's first felony trial. As soon as a judgment of conviction is entered, if he possessed any firearms which had previously traveled in commerce, he would immediately be in violation of §1202(a). If a person could not afford bond and thereafter entered a guilty plea, he could conceivably never have an opportunity to relinquish possession. Following acceptance of the plea, the Government could immediately seize any weapons in the defendant's possession and initiate federal proceedings under §1202(a). Although this situation may seem unduly hypothetical, such a result could legally occur if it is held that possession need not have a contemporaneous effect upon commerce.

B. To Permit Prosecution For Possession of a Firearm Without A Contemporaneous Nexus To Commerce Would Interfere With The Allocation Of State and Federal Jurisdiction In A Federalist System Without A Clear Intent By Congress To Do So.

The Government's view of §1202(a) necessarily challenges the premise upon which *Bass* rests: the allocation of criminal jurisdiction between the states and the federal government. For the Government to prevail, the Court must reject principles of federalism supporting *Bass* which are deeply rooted in federal jurisprudence, and involve considerations to which this Court has become increasingly sensitive.

This Court has already held that, in view of its ambiguity, hasty enactment, and paucity of legislative

history, §1202(a) must be narrowly construed to avoid intruding into traditional areas of state criminal jurisdiction. *United States v. Bass,* 404 U.S. 336, 349-50 (1971). In *Bass,* the Court echoed *United States v. Five Gambling Devices,* 346 U.S. 441, 450 (1950), where the Court, in an opinion by Justice Jackson, warned that only an "unmistakable intention" by Congress would permit it to interpret an anti-gambling statute as purporting to eliminate the requirement of a nexus with interstate commerce. Such an interpretation would have an "extreme impact upon affairs considered normally reserved to the States," 346 U.S. at 450, and could not be construed so casually. In *Bass,* the Court reaffirmed these principles:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in judicial decision.
>
> 404 U.S. at 349 (footnotes omitted).

Since "absent proof of some interstate commerce nexus *in each case,* §1202(a) dramatically intrudes upon traditional state criminal jurisdiction," 404 U.S. at 350 (emphasis added), the Court construed the statute to include an interstate commerce nexus as an element of each offense listed in that Section.

Since *Bass*, the Court has continued to interpret federal criminal statutes consistent with these guidelines. In *United States v. Enmons,* 410 U.S. 396 (1973), for

example, the Government attempted to prosecute union members under the Hobbs Act, 18 U.S.C. §1951, for violence which erupted in a labor strike. The Court there recognized that the control of picket line violence was traditionally a state prerogative, so that "it would require statutory language much more explicit than that before us to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes." 410 U.S. at 411. The Court went on to state that the Hobbs Act could not be construed, as written, to justify "such an extraordinary change in federal labor law of such an unprecedented incursion into the criminal jurisdiction of the states." 410 U.S. at 411. *Cf., Heublein v. South Carolina Tax Commission,* 409 U.S. 275 (1972); *Rewis v. United States,* 401 U.S. 808 (1971).

In accordance with these principles, the Court in *Bass* required, as an element of each §1202(a) offense, proof of a nexus between the defendant's act and interstate commerce. For the crimes of receipt or transport of a firearm, that nexus is straightforward enough, and proof will be simple. Those offenses necessarily involve either a transaction or movement, so are traditionally understood to be directly within commerce. Even in cases where the individual receipt or transport transaction does not involve interstate commerce, the transaction itself is properly said to be in commerce. *See Barrett v. United States,* 423 U.S. 212 (1976). As one Court of Appeals put it, receipt and transport have a definite "federal jurisdictional flavor," *United States v. Bell,* 524 F.2d 202, 209 (2nd Cir. 1975). Federal statutes generally punish offenses concerning movement or acts affecting commerce, *e.g.,* 18 U.S.C. §1951 (obstructing or affecting interstate commerce or movement of commodities in

commerce by robbery or extortion); 18 U.S.C. §875 (transmitting kidnapping threats by means of interstate commerce); 18 U.S.C. §2421 (transporting women in interstate commerce for prostitution).

Mere possession of a firearm, on the contrary, is not so obviously linked to commerce. Unlike receipt or transport, possession is not normally in commerce, nor does it affect commerce. In this case, the connection between Scarborough's possession of a firearm after conviction and commerce could hardly be more distant. Prior to his felony conviction, Scarborough's guns passed through interstate commerce; since his conviction, the relevant triggering event for §1202(a), they have had no connection with commerce of any sort. They have not been used; they have not even been moved. It is for that reason, as *Bass* recognized, that possession is the kind of crime which is "traditionally local criminal conduct," 404 U.S. at 350, the regulation of which belongs in the states and has been left there by Congress.[4] Federal concern and the

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[4]Thirty-seven states and the District of Columbia prescribe whether convicted felons may possess or buy firearms. This list excludes regulation of the use of machine guns by convicted felons. *See* Ala. Code. tit. 14, §174(a) (1958); Alaska Stat. §11.55.030 (1970); Ariz. Rev. Stat. Ann. §13-909(A) (1956); Ark. Stat. Ann. §41-3103(1)(a) (1947); Cal. Penal Code §12021(a) (1970); Colo. Rev. Stat. Ann. §18-12-108 (1973); D.C. Code §22-3203(2) (1973); Fla. Stat. Ann. §790.23(1) (1976); Hawaii Rev. Stat. §134-7(b) (1968); Ill. Rev. Stat. tit. 38, §24-3.(a)(3) (Smith-Hurd 1976); Ind. Stat. Ann. §35-23-4.1-6 [Burns 10-4751f] (1975); Kan. Stat. Ann. §21-4204(1)(b) (1974); Ky. Rev. Stat. Ann. §527.040(1) (1969); La. Rev. Stat. Ann. §14:95.1 (West 1976); Me Rev. Stat. Ann. tit. 15, §393 (1964); Md. Ann. Code tit. 27, §445(c) (1976); Mass. Gen. Laws Ann. ch. 140, §122 (1972); Mich. Stat. Ann. §28.92 (1962); Minn. Stat. Ann. §624.713(1)(b) (West 1976); Miss. Code Ann. §97-37-5 (1972); Neb. Rev. Stat. §28-1011.15 (1975); Nev. Rev. Stat. §202.360 (1973); N.H. Rev. Stat. Ann. ch. 159:3 (1955); N.J. Stat. Ann. 2A:151-8 (1969);

[Footnote continued]

expenditure of federal resources for prosecution of a felon's possession of a firearm is consistent with federalism only if that possession directly affects commerce as in Justice Marshall's example in *Bass*. Otherwise, not only would federal activity interfere with state enforcement, but state and federal efforts would largely be duplicative, *United States v. Kelly*, 519 F.2d 251, 254 n. 5 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975). Further, federal prosecutions would unnecessarily "further burden the district courts with additional criminal litigation." *United States v. Bell*, 524 F.2d 202, 209 (1975). Without a concerted policy by Congress, that balance cannot be changed.

It is these considerations which compel reinforcement of the Court's analysis in Part III of *Bass*, where the Court explained the limited circumstances in which possession is cognizable as a federal offense under this statute.[5] The Government claims that the passage in Part III of *Bass* is mere dicta, or in any event does not restrict prosecution for possession even where, as here, the

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N.Y. Penal Law §265.01(4) (McKinney 1976); N.C. Gen. Stat. §14-415.1 (1975); N.D. Cent. Code §62-01-04(1) (1960); Ohio Rev. Code Ann. §2923.13(A) (Page 1975); Okla. Stat. Ann. tit. 21, §1283 (1976); Ore. Rev. Stat. §166.270 (1975); Pa. Stat. Ann. tit. 18, §6105 (1973); R.I. Gen. Laws Ann. §11-47-5 (1956); S.C. Code Ann. §16-129.2(a) (Cum.Supp. 1975); S.D. Compiled Laws Ann. §23-7-3 (1967); Tenn. Code Ann. §39.4904 (Cum. Supp. 1974); Tex. Code Ann. tit. 10, ch. 46, §46.05(a) (Vernon 1974); Utah Code Ann. §76-10-503 (Supp. 1975); and Wash. Rev. Code Ann. §9.41-040 (1961).

Seven of the above states enacted legislation within the last three years (Ill., Ky., La., Minn., N.Y., N.C., Tenn). Additionally, municipalities and counties throughout the country regulate firearms within their respective jurisdictions. *See U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Firearms Regulation* (1976).

[5]Possession of a firearm by a convicted felon is not an offense under 18 U.S.C. §922(h). *See* n.1 *supra*.

possession originated prior to the felony conviction. But to adopt the Government's position and ignore the restrictions contained in that passage would either emasculate the integrity of the statute or the principles of federalism which support it.

If the Court determines that the interstate commerce nexus is satisfied here, the Court must adopt one of two equally untenable positions: first, it may incorporate the crime of possession into the crime of receipt, thereby eliminating the distinction between receipt and possession, *see* pages 13-14, *supra;* or second, it may use the most trivial connection to commerce to sustain a conviction, thereby demeaning the federalism principles that support the statute.

If the crime of simple possession remains distinct from the crime of receipt, then the only commerce nexus possible becomes so remote as to be trivial. Possession carries with it nothing more than the mere potential of the entry of the firearm into the stream of commerce. If that is enough to satisfy the commerce requirement, it would so impoverish principles of federalism upon which *Bass* rests that *Bass* would be overruled in fact if not in name. Accordingly, the facts purporting to meet the nexus requirement must be substantial enough to demonstrate the respect for federalism demanded by the imposition of a nexus requirement in the first place. The Court emphasized the importance of that connection in *Rewis v. United States,* 401 U.S. 808 (1971), where it held that, in statutes which do not demonstrate a clear intent by Congress to intrude on traditional areas of state criminal jurisdiction, and which require a commerce nexus in individual cases, the transactions at issue may not have the nexus satisfied by a trivial link to commerce.

In *Rewis,* the Court held that the operator of a gambling establishment could not be prosecuted under the Travel Act, 18 U.S.C. §1952, simply because some of his customers came from another state. The Court there explained that where federal prosecutions could seriously alter federal-state relationships concerning criminal jurisdiction, and where there is no explicit Congressional intent to so jeopardize the existing federal-state balance, the Court must construe the commerce nexus requirements strictly. *See Erlenbaugh v. United States,* 409 U.S. 239, 245 (1972) (Travel Act applies to criminal activity "which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce.").

Since the Court has already determined in *Bass* that Congress did not intend §1202(a) to change federal-state spheres of enforcement, the nexus requirements articulated in *Rewis* with respect to the Travel Act apply with equal force here. In light of *Rewis,* the Court's illustration in Part III of *Bass* of the offenses cognizable under §1202(a) can only be understood as implementing those nexus requirements. The Court there restricted the possession crimes of §1202(a) to those where a strong nexus can be demonstrated, but does not restrict receipt crimes, which are by their nature in or affecting commerce.

Understood in that light, the examples proffered in Part III of *Bass,* relating to the Government's burden of proof, are not irrelevant plumage for an Opinion. Rather, they show that in order to preserve federalism, each offense in §1202(a) requires a different sort of nexus with commerce. As Justice, then Judge Stevens, noted in *United States v. Walker,* 489 F.2d 1353 (7th Cir. 1973), *cert. denied,* 415 U.S. 982 (1974), "the entire opinion

demonstrates that Mr. Justice Marshall's choice of language was deliberate and precise." 489 F.2d at 1357. Significantly, every Circuit that has required a showing of contemporaneous affect upon commerce for the possession offense recognized the federalism concerns voiced in *Bass*. *See United States v. Ressler*, 536 F.2d 208 (7th Cir. 1976); *United States v. Lathan*, 531 F.2d 955 (9th Cir. 1976); *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975); *United States v. Bell*, 524 F.2d 202 (2nd Cir. 1975); *United States v. Kelly*, 519 F.2d 251 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975); *United States v. Cassity*, 509 F.2d 682 (9th Cir. 1974). *Cf., United States v. Goodie*, 524 F.2d 515 (5th Cir. 1975); *United States v. Walker*, 489 F.2d 1353 (7th Cir. 1973); *cert. denied*, 415 U.S. 982 (1974); *United States v. Thomas*, 485 F.2d 557 (5th Cir. 1973). Circuits holding to the contrary have conspicuously ignored these fundamental precepts of federalism. *See e.g., United States v. Scarborough*, No. 74-1193 (4th Cir. Jan. 29, 1976); *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976); *Carter v. United States*, No. 75-2215 (6th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3165 (U.S. Je. 28, 1976) (No. 75-1882); *United States v. Bumphus*, 508 F.2d 1405 (10th Cir. 1975). Accordingly, the most stringent nexus requirement must be imposed on the Government to prove possession of a firearm by a convicted felon.

More is at stake here, though, than simply applying the Court's recent interpretation of federal firearms statutes. If the Court declines to follow *Rewis* and *Bass*, and instead accepts Scarborough's meager nexus to interstate commerce in this case as sufficient, it would necessarily weaken the concepts of federalism, and the concommittant respect for state activity, which this Court has a

special duty to protect. This Court has repeatedly emphasized the measured and deliberate manner in which federal interference by any branch into activities traditionally understood to be within the scope of state prerogative must take. As the Court stated in *Younger v. Harris*, 401 U.S. 37 (1971):

> [T]he National Government, anxious though it may be to vindicate federal rights and federal interests, always endeavors to do so in ways which will not unduly interfere with legitimate activities of the States.
>
> 401 U.S. at 44.

These principles have been recently reaffirmed by the Court in the *Younger* context. *See, e.g., Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Furthermore, just last Term, the Court held that the commerce clause, though normally sufficient to sustain federal power over state activities, could not overcome affirmative limitations on Congress' authority inherent in state sovereignity. *National League of Cities v. Usery*, 96 S.Ct. 2465 (1976). In addition, it held that federal equitable relief should not be available to enjoin state activities where the result of such relief would disrupt legitimate operations of the internal affairs of Government. *Rizzo v. Goode*, 423 U.S. 362 (1976). If only the most tangential link to interstate commerce is required to overtake an important aspect of state criminal law, little remains of federalism in any context.

To be sure, neither *Rewis* nor restraints on the nexus requirements of § 1202(a) inherent in federalism apply to every federal criminal statute premised on interstate commerce. Congress has the power to confer federal authority to prosecute crimes previously in the state domain, and even eliminate the requirement of individual

proof that a particular transaction has a specific connection with interstate commerce. That result may only be accomplished, however, where two conditions have been met. First, Congress must explicitly and clearly decide to accomplish that end. *See e.g., United States v. Huddleston,* 415 U.S. 814, 832 n.11 (1974); *United States v. DeMet,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974) (Prosecutions under Hobbs Act, 18 U.S.C. §1951, require only the slightest proof of connection with interstate commerce because of legislation to the full extent of Congressional power); *United States v. Sacco,* 491 F.2d 995 (9th Cir. 1974); *United States v. Hunter,* 478 F.2d 1019 (7th Cir.), *cert. denied,* 414 U.S. 857 (1973) (18 U.S.C. §1955, regulating interstate gambling business, requires no proof of direct interstate commerce). Second, it must make specific findings that the action it seeks to take has a rational connection to the commerce power upon which it is based. *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

That neither of those conditions is met here is beyond dispute. On the contrary, the statute has been found by this Court to be both ambiguous and the product of last-minute legislating rather than careful and deliberate study.[6] *United States v. Bass,* 404 U.S. 336 (1971).

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[6]Following Senator Long's remarks, several Senators commented that, although the purpose behind §1202(a) was commendable, further study of the proposed amendment by a Conference Committee would be desirable. At this time, however, several Senators called for a vote and the amendment was passed without further discussion. *See* 114 *Cong. Rec.* 14,775 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, affirming petitioner's conviction, should be reversed.

Respectfully submitted,

PHILIP J. HIRSCHKOP
LEONARD S. RUBENSTEIN
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-5555

Attorneys for Petitioner.